1984

Utah Farm Production Credit Association (Successor in interest to Bank of American Fork) v. WASATCH BANK OF PLEASANT GROVE, BUSHNELL FINANCE & CONSTRUCTION CO.; ADMINISTRATOR, SMALL BUSINESS ADMINISTRATION; UNITED STATES OF AMERICA; WENDELL HANSEN; LaVON HANSEN; MACKEY B. BOLEY; JOYCE S. BOLEY; MAPLE CANYON, INC.; MAPLE CANYON PARTNERSHIP; EVERGREEN TURF AND TREE FARMS, INC.; WESTERN HOME BANK (PIONEER STATE BANK); RAIN FOR RENT, INC.; UTAH STATE TAX

COMMISSION; FMA AUTO LEASING CO.; E. F. HUTTON CREDIT CORP.; INDUSTRIAL COMMISSION OF UTAH; STRAWBERRY WATER USERS ASSOCIATION; UTAH DEPARTMENT OF EMPLOYMENT SECURITY : Brief of Respondent

Utah Supreme Court

James R. Brown; Jardine, Linebaugh, Brown & Dunn; Attorney for Respondent.
S. Rex Lewis; Howard, Lewis & Petersen; Attorneys for Appellant .

IN THE SUPREME COURT

FOR THE STATE OF UTAH

UTAH FARM PRODUCTION CREDIT ASSOCIATION (Successor in interest to Bank of American Fork),	1984/9988
Plaintiff-Respondent,	
vs.	
WASATCH BANK OF PLEASANT GROVE, BUSHNELL FINANCE & CONSTRUCTION CO.; ADMINISTRATOR, SMALL BUSINESS ADMINISTRATION; UNITED STATES OF AMERICA; WENDELL HANSEN; LaVON HANSEN; MACKEY B. BOLEY; JOYCE S. BOLEY; MAPLE CANYON, INC.; MAPLE CANYON PARTNERSHIP; EVERGREEN TURF AND TREE FARMS, INC.; WESTERN HOME BANK (PIONEER STATE BANK); RAIN FOR RENT, INC.; UTAH STATE TAX COMMISSION; FMA AUTO LEASING CO.; E. F. HUTTON CREDIT CORP.; INDUSTRIAL COMMISSION OF UTAH; STRAWBERRY WATER USERS ASSOCIATION; UTAH DEPARTMENT OF EMPLOYMENT SECURITY,	Case No. 19,988
Defendants-Appellants.	

BRIEF OF RESPONDENT UTAH FARM PRODUCTION CREDIT ASSOCIATION

APPEAL FROM A JUDGMENT RENDERED IN THE
FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,
THE HONORABLE DAVID SAM, JUDGE, PRESIDING

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IN THE SUPREME COURT

FOR THE STATE OF UTAH

UTAH FARM PRODUCTION CREDIT ASSOCIATION (Successor in interest to Bank of American Fork), Plaintiff-Respondent, vs. WASATCH BANK OF PLEASANT GROVE, BUSHNELL FINANCE & CONSTRUCTION CO.; ADMINISTRATOR, SMALL BUSINESS ADMINISTRATION; UNITED STATES OF AMERICA; WENDELL HANSEN; LaVON HANSEN; MACKEY B. BOLEY; JOYCE S. BOLEY; MAPLE CANYON, INC.; MAPLE CANYON PARTNERSHIP; EVERGREEN TURF AND TREE FARMS, INC.; WESTERN HOME BANK (PIONEER STATE BANK); RAIN FOR RENT, INC.; UTAH STATE TAX COMMISSION; FMA AUTO LEASING CO.; E. F. HUTTON CREDIT CORP.; INDUSTRIAL COMMISSION OF UTAH; STRAWBERRY WATER USERS ASSOCIATION; UTAH DEPARTMENT OF EMPLOYMENT SECURITY, Defendants-Appellants.	Case No. 19,988

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FOR THE STATE OF UTAH

UTAH FARM PRODUCTION CREDIT ASSOCIATION (Successor in interest to Bank of American Fork), Plaintiff-Respondent, vs. WASATCH BANK OF PLEASANT GROVE, BUSHNELL FINANCE & CONSTRUCTION CO.; ADMINISTRATOR, SMALL BUSINESS ADMINISTRATION; UNITED STATES OF AMERICA; WENDELL HANSEN; LaVON HANSEN; MACKEY B. BOLEY; JOYCE S. BOLEY; MAPLE CANYON, INC.; MAPLE CANYON PARTNERSHIP; EVERGREEN TURF AND TREE FARMS, INC.; WESTERN HOME BANK (PIONEER STATE BANK); RAIN FOR RENT, INC.; UTAH STATE TAX COMMISSION; FMA AUTO LEASING CO.; E. F. HUTTON CREDIT CORP.; INDUSTRIAL COMMISSION OF UTAH; STRAWBERRY WATER USERS ASSOCIATION; UTAH DEPARTMENT OF EMPLOYMENT SECURITY, Defendants-Appellants.	Case No. 19,988

NATURE OF THE CASE

Respondent brought a foreclosure action and Wasatch Bank asserted that its interest is superior to PCA. The Court held that Wasatch Bank was junior to that of PCA.

RELIEF SOUGHT ON APPEAL

Respondent PCA seeks to have the judgment affirmed.

STATEMENT OF FACTS

The issue of priority was decided on cross-motions for summary judgment filed by PCA and Wasatch Bank. The facts are not in dispute which are relevant to the determination of this single issue. Certain documents have been duly recorded in the Utah County Recorder's Office. Wasatch Bank has admitted in its Cross-Motion for Summary Judgment certain facts which are:

> 1. Wasatch Bank . . . admits that on May 9, 1980, it was aware that a contract existed between Silar Harry Koyle and Edith H. Koyle, trustee, as seller, and Wendell Hansen and Mackey B. Boley as purchaser, by reason of assignments of that contract that were recorded respectively on April 22, 1976, January 5, 1977, and March 31, 1978.
>
> 2. Wasatch Bank . . . admits it was aware of the warranty deed which was recorded on February 25, 1975, in Book 1460 at Page 882.
>
> . . .
>
> 4. Wasatch Bank . . . admits it was aware of the assignment dated April 21, 1976, and recorded April 22, 1976, and was charged with notice of its contents.
>
> 5. Wasatch Bank . . . admits it was aware of and charged with notice of the assignment dated January 4, 1977, and recorded January 5, 1977, and of its contents.
>
> 6. Wasatch Bank . . . admits it was charged with notice of the contents of an assignment of Uniform Real Estate Contract recorded March 31, 1978, in Book 1633 at Page 167.
>
> 7. Wasatch Bank . . . admits that a deed dated the 1st day of May, 1975, and acknowledged the 1st day of May, 1975, was recorded on May 23, 1979, in Book 1746 at Page 303.

In addition, the documents of record in the Utah County Recorder's Office are:

1. A warranty deed from Silas Harry Koyle and Edith H. Koyle to Mackey B. Boley and Wendell Hansen, dated and acknowledged May 1, 1975, and recorded May 23, 1979, a copy of which is attached as Appendix 1 to Appellant's Brief. (R. 279.)

2. A warranty deed from Wendell Hansen and LaVon Hansen to Mackey B. Boley and Joyce S. Boley, dated October 7, 1975, and recorded February 25, 1976, a copy of which is attached as Appendix 2 to Appellant's Brief. (R. 280.)

3. An assignment of a Uniform Real Estate Contract from Evergreen Turf and Tree Farms, Inc., to Bank of American Fork, dated April 21, 1976, and recorded April 22, 1976, a copy of which is attached as Appendix 3 to Appellant's Brief. (R. 281-82.)

4. An assignment of a Uniform Real Estate Contract from Evergreen Turf and Tree Farms, Inc., to Bank of American Fork, dated January 4, 1977, and recorded January 25, 1977, a copy of which is attached as Appendix 4 to Appellant's Brief. (R.283-84.)

5. An assignment of a Uniform Real Estate Contract from Evergreen Turf and Tree Farms, Inc., to Bank of American Fork, acknowledged March 29, 1978, and recorded March 31, 1978, a copy of which is attached as Appendix 5 to Appellant's Brief. (R. 285-86.)

6. A trust deed from Mackay B. Boley and Joyce S. Boley to Wasatch Bank of Pleasant Grove, dated May 6, 1980, and recorded May 9, 1980, a copy of which is attached as Appendix 6 to Appellant's Brief. (R. 287-89.)

7. A trustee's deed from Wasatch Bank of Pleasant Grove, trustee, to Wasatch Bank of Pleasant Grove, dated March 11, 1983, and recorded March 14, 1983, a copy of which is attached as Appendix 7 to Appellant's Brief. (R. 290-294.)

These documents and the admissions show that the entire parcel (approximately 397 acres), including the property claimed by Wasatch Bank of Pleasant Grove (16.72 acres), was first owned by Mr. and Mrs. Koyle. There was a contract of sale between Koyles and Mr. Hansen and Mr. Boley and certain deeds were placed in escrow to be delivered upon payment. The deeds are all dated May 1, 1975. On October 7, 1975, Mr. and Mrs. Hansen conveyed their interest in the property (397 acres) and the contract of sale to Mr. and Mrs. Boley.

Boley conveyed by assignment all his interest in and to the contract of purchase to Evergreen Turf and Tree Farms. On May 6, 1980, Mr. and Mrs. Boley conveyed the 16.72 acre parcel, together with an unrelated parcel, by trust deed to Wasatch Bank of Pleasant Grove to secure payment of certain obligations. Boleys later defaulted on their payments, and Wasatch Bank of Pleasant Grove exercised its power of sale under the trust deed. Wasatch

Bank of Pleasant Grove was the high bidder at the trustee's sale, and received a trustee's deed to the property.

The claim of PCA arises out of a Uniform Real Estate Contract, dated May 1, 1975, from Mr. and Mrs. Koyle to Mr. Hansen and Mr. Boley. The contract was not of record. The buyers' interest under that contract was assigned to Evergreen Turf and Tree Farms, Inc. However, the assignment was not of record per se, but reference is made to the assignment. Evergreen Turf and Tree Farms, Inc., assigned its interest in the contract by three separate assignments to Bank of American Fork. These assignments from Evergreen Turf and Tree Farms, Inc. to Bank of American Fork were recorded and executed by Mr. Boley, the same person who executed the trust deed to Wasatch Bank. The Bank of American Fork documents referred to the Uniform Real Estate Contract and subsequent assignments. The legal description on the assignments is that of the entire 397 acre parcel, less certain other unrelated parcels. PCA is the successor in interest to Bank of American Fork.

PCA brought this action to foreclose its interest under the Evergreen Turf and Tree Farms, Inc. assignments (R. 110-49.) Wasatch Bank counterclaimed to quiet title in it to the 16.72 acre parcel. (R. 14-16.) On cross-motions for summary judgment, the Trial Court concluded that PCA had a lien on the subject property, and that the lien of PCA was prior to the trustee's deed of Wasatch Bank of Pleasant Grove, and decreed that the

property be sold at a sheriff's sale. (R. 315.) A copy of the summary judgment and decree of foreclosure is attached as Appendix 8 to Appellant's Brief. Wasatch Bank of Pleasant Grove thereafter perfected this appeal.

ARGUMENT

POINT I

THE LIENS OF PCA ARE SENIOR TO THAT OF WASATCH BANK

Whether the lien of Bank of American Fork is accorded priority over that of Wasatch Bank turns on whether Wasatch Bank had notice, actual or constructive, of the lien of Bank of American Fork at the time it took its trust deed. It is well-settled that the lien of a mortgagee on the vendee's interest under a real estate contract will attach to the fee when acquired by the vendee.

In a recent Utah case, Lockhart Co. vs. Anderson, 646 P.2d 678 (Utah 1982), Justice Oaks held that an assignee of the purchaser's interest in a real estate contract may treat that interest as a mortgage and foreclose it as such:

> It is clear from earlier decisions of this Court that the buyer's interest under a real state contract is an interest in real property. When that interest is assigned as security for a loan, the assignee-lender acquires a lien on the borrower's interest in the real property, which is treated like a mortgage. The lender can foreclose its interest like a mortgage. The lender can foreclose its interest like a mortgage, and the borrower has the same right of redemption as he would have under a mortgage. 646 P.2d at 679, 680.

The Lockhart case does not even mention whether the assignments were recorded or not, but the opinion seems to proceed upon the assumption that such assignments are accorded priority under the usual rules governing recording in Utah. Justice Oaks cited another case, Utah State Employees Credit Union vs. Riding, 24 Utah 2d 211, 469 P.2d 1 (1970), which addresses this issue a bit more directly. In Riding, the purchasers under a real estate contract assigned their rights to a credit union as security for a loan and then, subsequently, assigned their rights again. The second assignment was apparently not intended as security. The first assignment to the credit union was recorded, but the second was not. The credit union brought an action to foreclose their interest and their motion for summary judgment was granted. In commenting on the merits of the case, this Court stated:

> There seems to be no escape from the conclusion that at that time [at the time of the second assignment] the plaintiff had a subsisting, recorded claim against [the debtors'] interest in the real property, which plaintiff could assert, superior to [the second assignee]. . . 469 P.2d at 2.

The findings and conclusions of the Trial Court were quoted, including the following:

> The Defendants [the second assignees] are charged with such notice as is shown on the records of Kane County. Had they made the inquiry they were obliged to make, they would have learned of the assignment . . . to this Plaintiff. This record imparts notice to all persons. It is elemental that priorities are determined by successive recordings. The applicable statutory provisions defeat any claim the Defendants [second assignees] may have acquired by reason of their assignment. Id.

On the basis of these cases, it is clear that Bank of American Fork or its successor, PCA, would be permitted to treat its assignments of the purchaser's interest under the real estate contracts in question as mortgages, and to foreclose them accordingly. This is especially true where the liens of Plaintiff were recorded and of record before any lien was recorded by Wasatch Bank.

Wasatch Bank claims its interest is superior to that of Bank of American Fork on the ground that Wasatch Bank need only look at its chain of title and that Bank of American Fork's position is outside of that chain. Since Utah has a tract index, this principle does not apply, and Wasatch Bank is charged with notice of any instrument recorded in that index prior to the time it took its trust deed. Brigham Young University Legal Studies, 1 Summary of Utah Real Property Law, 100, 101. There can hardly be any doubt that prior to taking its trust deed, Wasatch Bank must have ordered a title report on the subject property which would have revealed the prior recorded interest of Bank of American Fork.

The law is well settled that:

> Where the statutes require that a numerical or tract index be kept, a subsequent purchaser or encumbrancer is under a duty to examine that index, as well as those kept by names of grantors and grantees. Accordingly, he is held to have constructive notice of any instrument such an examination would disclose, though executed by one not in his own chain of title. 66 Am. Jur. 2d, Records and Recording Laws, §115. (emphasis supplied)

Utah has a statute relating to tract indexes which is found at 17-21-6, Utah Code Annotated, 1953, as amended, which provides in part:

> Every recorder must keep: . . .
>
> (6) An abstract record, which shall show by tracts or parcels every conveyance or encumbrance, or other instrument recorded, the date and character of the instrument, time of filing the same, and the book and page and entry number where the same is recorded, which record shall be so kept as to show a true chain of title to each tract or parcel and the encumbrances thereon as shown by the records of the office. (emphasis supplied)

Section 57-1-6, Utah Code Annotated, 1953, as amended, provides in part:

> Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate or whereby any real estate may be affected, to operate as notice to third persons shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such proofs, acknowledgment, certification or record, and as to all other persons who have had actual notice. (emphasis supplied)

This Court in Crompton v. Jenson, 78 Utah 55, 1 P.2d 242, has held that anyone who deals with real property is charged with notice of what is shown by the records of the county in which the property is situated. The authority cited by Appellant is not applicable since it applies to jurisdictions which have no tract index. The tract indexing in this case discloses the prior liens of Bank of American Fork. See the record at pages 52-53.

Finally, Wasatch Bank acknowledged and admitted in its response to certain statement of facts propounded by PCA:

1. Wasatch Bank . . . admits that on May 9, 1980, it was aware that a contract existed between Silar Harry Koyle and Edith H. Koyle, trustee, as seller, and Wendell Hansen and Mackey B. Boley as purchaser, by reason of assignments of that contract that were recorded respectively on April 22, 1976, January 5, 1977, and March 31, 1978.

. . .

4. Wasatch Bank . . . admits it was aware of the assignment dated April 21, 1976, and recorded April 22, 1976, and was charged with notice of its contents.

5. Wasatch Bank . . . admits it was aware of and charged with notice of the assignment dated January 4, 1977, and recorded January 5, 1977, and of its contents.

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In Huffaker v. First National Bank, 52 Utah 317, 173 P. 903 (1918), one of the issues was whether a particular recorded document was sufficient to put a subsequent lienor upon inquiry notice as to the unrecorded interest of an assignee of the seller's interest under a real estate contract. The assignee argued that a prior recorded trust deed should have provided at least inquiry as to the interests of the seller's assignee. This trust deed had been executed by the seller for the dual purpose of protecting vendees under certain real estate contracts as well as for the purpose of securing a loan from the "grantee" under the trust deed. The court focused on the nature of the recorded document in determining whether it would have provided a searcher with inquiry notice, and concluded that since it was concerned entirely with the rights of the purchasers of the property under

the contracts and with the loan to the grantee, it could not provide notice that there might have been an assignment of the seller's interest under the contract. Applying the analysis of Huffaker to the situation at hand, it is clear that if Wasatch Bank consulted the tract index as it was required to do, it could hardly have ignored an assignment for security by the Boleys when it was about to take a trust deed from the Boleys.

Wasatch Bank could not rely upon the release of this particular parcel by the Koyles and the recording of legal title in the Boyles. Since the assignment to Bank of American Fork was in the nature of a mortgage, only Bank of American Fork could release the property from its mortgage. See Gulf South Bank & Trust Company v. Demarest, 354 So.2d 695 (La. App. 1978). This elementary principle was applied by the court in Andy Associates, Inc. v. Banker's Trust Company, 399 N.E. 2d 1160 (N.Y. App. 1979). In this case, a tenant of a commercial building paid the landlord a security deposit and the landlord gave the tenant a mortgage on the leased premises to insure eventual repayment of the deposit. The tenant assigned the mortgage to the landlord to secure the landlord against default by the tenant. The court noted that this particular mortgage indicated on its face that it created two separate chains of interest. The rights of the tenant, including the right to foreclose in the event the security deposit was wrongfully withheld, could be passed on to other tenants, along with the assignment of the leasehold

interest. The rights of the landlord to hold the mortgage as collateral security for the tenant's performance of the lease could be assigned to successive owners of the premises as title to the property changed hands. Since this information was apparent from the face of the mortgage, the court concluded that it would be sufficient to put a searcher on notice of the two separate chains of interest and that each of these chains should have been investigated by any party searching the record. In this case, the landlord's interest was assigned several times and the third assignee recorded an instrument which purported to represent a satisfaction of the mortgage. Shortly thereafter, the third assignee executed a new mortgage on the premises to a lender. When the assignee of the lessee's interest under the mortgage sued to foreclose because the security deposit had not been repaid, the lender argued that its later mortgage should not be held subordinate to that of the lessee. The court disagreed and held that the lender had been put on notice of the lessee's interest by the recorded mortgage:

> It is true that, in the ordinary case, a purchaser is entitled to rely upon a 'satisfaction' of a mortgage recorded by a person who appears to hold the instrument as an assignee...Nothing...can be construed to override the even more fundamental rule that a satisfaction entered by one who was without authority to do so cannot serve to insulate a subsequent purchaser from prior claims, when the existence of such claims was apparent from the face of the record... 399 N.E. 2d 1165.

It is worth noting that there is general agreement that:

> ...the lien of a mortgage on an executory contract to purchase real property attaches to the fee acquired by the

completion of the contract of purchase. 55 Am. Jur. 2d Mortgages, §1091.

The same principle applies to mortgages of an option to purchase contained in a lease. See 85 A.L.R. 927, 930. Bank of Louisville v. Baumeister, 7 S.W. 170 (Ky. 1888), deals with a lien on an option to purchase, but seems to be most directly on point. In this case, the owner of the subject property executed to a Mr. Spalding a lease with an option to purchase. Spalding mortgaged the lease and option to a Mr. Olds. Spalding later exercised the option, paying part of the purchase price in cash and gave back a purchase money mortgage to the owner to secure the balance. After acquiring legal title, Spalding mortgaged his interest to the Bank of Louisville, and later gave another mortgage to an individual. This individual brought an action of foreclosure and the foreclosure decree assigned priority to the various liens as follows:

(1) The purchase money mortgage of the original owner was given first priority on the well accepted principle that a purchase money lien is entitled to priority over all other liens;

(2) The lien of Mr. Olds on the lease and option;

(3) The lien of the Bank of Louisville;

(4) The lien of the individual.

On appeal, the Bank of Louisville argued that its lien should have priority over that of Mr. Olds. However, the court held

that the lien of Olds on the lease and option became a lien on the fee when the fee was acquired by the exercise of the option.

Another related principle worth noting is:

> A mortgage on real property to be acquired by the mortgagor in the future takes effect as an encumbrance thereon immediately upon acquisition of the property by the mortgagor; and in the absence of a statutory provision to the contrary, the interest of the mortgagee in the property is generally regarded as superior to the interests of all persons claiming through the mortgagor, including subsequent purchasers, mortgagees, and encumbrances generally. This rule is particularly applicable where the person acquiring the subsequent interest has knowledge of the prior mortgage, but in some cases the rule is held to prevail even where there is no such knowledge. 55 Am. Jur. 2d Mortgages, §360.

CONCLUSION

The admissions acknowledged by Wasatch Bank give notice of inquiry to Appellant. The priorities under Utah statutory law is clear. Wasatch's interest is clearly recorded after the Bank of American Fork and PCA, as successor in interest to Bank of American Fork, has a superior lien.

DATED this the 25 day of October, 1984.

Respectfully Submitted,

JARDINE, LINEBAUGH, BROWN & DUNN

By _____
JAMES R. BROWN
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CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Respondent's Brief to S. Rex Lewis, HOWARD, LEWIS & PETERSEN, 120 East 300 North, P. O. Box 778, Provo, Utah 84603, this the 25th day of October, 1984, by United States mail, postage prepaid.